# Ng Hong Choon v Timbalan Menteri Hal Ehwal Dalam Negeri & Anor

SUPREME COURT (KUALA LUMPUR) — CRIMINAL APPEAL NO 05-213-92
GUNN CHIT TUAN CJ (MALAYA), MOHAMED AZMI AND WAN YAHYA SCJJ
27 AUGUST 1994

***Criminal Procedure*** *— Trial — Defence — Point of law raised at the trial itself even though not specifically pleaded — Allegation of non-compliance with the mandatory provisions of the Dangerous Drugs (Special Preventive Measures) Act 1985 — Whether appellant entitled to raise such point of law — Dangerous Drugs (Special Preventive Measures) Act 1985 s 3(2)(c)*

***Criminal Procedure*** *— Appeal — Additional evidence adduced by prosecution after time for filing evidence closed — Whether evidence properly admitted — Whether trivial in nature — Whether appellant entitled to take advantage of any technical imperfection invalidating restrictive order — Dangerous Drugs (Special Preventive Measures) Act 1985 s 3(2)(c) — Criminal Procedure Code (Cap 6) s 425*

***Criminal Procedure*** *— Habeas corpus — Preventive detention — Affidavit failed to specify actual date on which report was submitted to the Minister — Whether fatal — Dangerous Drugs (Special Preventive Measures) Act 1985 s 3(2)(c)*

The appellant was detained under the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') and an application was made for a writ of habeas corpus. At the hearing of the application, corrective and additional evidence by means of supplementary affidavits exhibiting documents were tendered by the respondents after the appellant's counsel had closed his case and commenced his submission. In the affidavit, the deponent merely stated that he received the report on the arrest and detention of the appellant from the investigating officer and 'seterusnya' (thereafter), he informed the Minister. The affidavit failed to specify the actual date on which the report was submitted to the Minister.

The issue in this case was whether such evidence was properly admitted by the High Court and if not so admitted, whether the requirement of s 3(2)(c) of the Act had been complied with on the basis of the available affidavit evidence filed in court as at the commencement of the hearing when oral submission by the applicant's counsel had already begun.

**Held**, allowing the appeal:

(1) The additional evidence could not be admitted under s 425 of the Criminal Procedure Code (Cap 6) because s 425 was clearly intended to apply to a trial involving viva voce evidence in which witnesses could be examined, cross-examined and re-examined.

Furthermore, even if the provision was to be applied, the discretionary and imperative provision of that section must be exercised only in rare cases where the evidence sought to be adduced was raised ex impromptu or that such evidence was not available with reasonable diligence at the time when the evidence of both parties had closed.

(2) A party may raise a point of law at the trial itself even though it had not been specifically pleaded. Here, the appellant was sufficiently entitled to raise an issue of law as one of his grounds in respect of an allegation of non-compliance with the mandatory provisions of the Act. It could not be denied that on the evidence available at the close of the affidavit evidence, the respondents were clearly in breach of the provisions of the Act, in that they had failed to comply with the mandatory requirement of proviso (c) to s 3(2) of the Act.

(3) The manoeuvre to alter a sworn statement by a further affidavit and the transformation of words by a later corrective affidavit to elude the authority of an unforeseen judgment, after the time for filing evidence had been closed, was not in any way trivial in nature. In cases of this nature, the appellant was entitled to take advantage of any technical imperfection which had the effect of invalidating the restrictive order.

**Obiter**:

On the basis of the affidavit evidence, as recorded, and as it stood before the court at the hearing of the application for habeas corpus, it could not be disputed that the defect in the affidavit in failing to specify the actual date on which the report had been submitted to the Minister was fatal.

**[Bahasa Malaysia summary**

Perayu telah ditahan di bawah Akta Dadah Berbahaya (Langkah-Langkah Pencegahan Khas) 1985 ('Akta itu') dan suatu permohonan telah dibuat untuk mendapatkan writ habeas corpus. Pada pendengaran permohonan itu, keterangan pembetulan dan tambahan telah dikemukakan oleh responden melalui afidavit tambahan yang mengeksibitkan dokumen selepas peguambela perayu telah menutup kesnya dan memulakan penghujahannya. Di dalam afidavit tersebut, saksi sumpah itu hanya menyatakan bahawa beliau telah menerima laporan mengenai penangkapan dan penahanan perayu daripada pegawai penyiasatan dan seterusnya beliau telah memberitahu Menteri. Afidavit itu gagal menetapkan tarikh sebenar bila laporan itu telah diserahkan kepada Menteri.

Isu di dalam kes ini adalah sama ada keterangan itu telah diterima dengan betul oleh Mahkamah Tinggi dan jikalau tidak, sama ada keperluan s 3(2)(c) Akta itu telah dipatuhi atas dasar keterangan

afidavit yang telah difailkan di mahkamah pada permulaan perbicaraan itu apabila penghujahan lisan oleh peguambela telahpun bermula.

**Diputuskan**, membenarkan rayuan itu:

(1) Keterangan tambahan itu tidak boleh diterima di bawah s 425 Kanun Acara Jenayah (Bab 6) kerana s 425 jelas dimaksudkan untuk terpakai kepada suatu perbicaraan yang melibatkan keterangan lisan ('viva voce') di mana saksi-saksi boleh diperiksa, diperiksa balas dan diperiksa semula. Lebih-lebih lagi, sekalipun peruntukan itu dipakai, peruntukan yang bersifat budi bicara dan imperatif di dalam seksyen itu mesti digunakan hanya di dalam kes yang luar biasa di mana keterangan yang ingin dikemukakan telah ditimbulkan secara ex impromptu atau keterangan tersebut tidak boleh didapati dengan ketekunan yang munasabah pada masa bila keterangan kedua-dua pihak telah ditutup.

(2) Sesuatu pihak boleh menimbulkan suatu perkara undang-undang pada perbicaraan itu walaupun ia tidak dijadikan pli secara spesifik. Di sini, perayu secukupnya berhak untuk menimbulkan suatu isu undang-undang sebagai satu daripada alasannya berkenaan dengan suatu pengataan ketidakpatuhan dengan peruntukan mandatori Akta itu. Tidak boleh dinafikan bahawa berdasarkan keterangan yang ada apabila keterangan afidavit ditutup, responden jelas telah memungkiri peruntukan Akta itu, iaitu mereka telah gagal mematuhi keperluan mandatori di dalam proviso (c) kepada s 3(2) Akta itu.

(3) Muslihat untuk mengubah suatu pernyataan bersumpah melalui satu afidavit lanjutan dan pengubahan perkataan melalui satu afidavit lanjutan kemudian untuk mengelak daripada kuasa suatu penghakiman yang tidak dapat diramalkan, selepas masa untuk memfailkan keterangan telah ditutup, bukanlah suatu perkara yang bersifat remeh-temeh. Di dalam kes seperti ini, perayu berhak mengambil kesempatan daripada sebarang ketidaksempurnaan teknikal yang berkesan untuk mentidaksahkan perintah tahanan itu.

**Obiter**:

Berdasarkan keterangan afidavit, seperti yang tercatat dan sepertimana yang dikemukakan kepada mahkamah pada pendengaran permohonan untuk habeas corpus, tidak boleh dipertikaikan bahawa kecacatan di dalam afidavit itu kerana gagal menetapkan tarikh sebenar bila laporan itu telah diserahkan kepada Menteri itu membawa padah.]

**Notes**

For cases on habeas corpus, see 5 *Mallal's Digest* (4th Ed) paras 1269–1277.

**Cases referred to**

*Balfour v PP* [1949] MLJ Supp 8 (refd)
*Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors* [1985] 2 MLJ 95 (refd)
*Datuk James Wong Kim Min, Re* [1976] 2 MLJ 245 (refd)
*Independent Automatic Sales Ltd v Knowles & Foster* [1962] 3 All ER 27; [1962] 1 WLR 974 (refd)
*Johannes Choeldi & Ors, Ex p* [1960] MLJ 184 (refd)
*Kesarmal & Anor v Valliappa Chettiar* [1954] MLJ 119 (refd)
*Ladd v Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489 (refd)
*Munusamy v Subramaniam & Ors* [1969] 2 MLJ 108 (refd)
*Nagin Singh v Jagannath* AIR 1944 Lah 422 (refd)
*Osman bin Mat Isa & Ors v Superintendent of Prison, Alor Star & Anor* [1974] 1 MLJ 189 (refd)
*PP v Abdul Hamid* [1969] 1 MLJ 53 (refd)
*R v Day* [1940] 1 All ER 402 (refd)
*State of UP v Lalai Singh Vadav* 1977 CLR (SC) 121 (refd)
*Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor and another appeal* [1990] 1 MLJ 171 (refd)
*Tan Yap Seng v Ketua Polis Negara & Ors* [1991] 2 CLJ 1400 (folld)
*Walsh v Sec of State for India* (1863) 10 HLC 367 (refd)
*Yah bte Aji v Fatimah bte Haji Mohamed Ariffin & Ors* [1969] 2 MLJ 186 (refd)

**Legislation referred to**

Courts Enactment No 14 of 1918
Courts of Judicature Act 1964 ss 25, 42(1)
Dangerous Drugs (Special Preventive Measures) Act 1985 s 3(2)(c)
Federal Constitution art 5
Criminal Procedure Code (FMS Cap 6) ss 365, 366, 367, 424, 425, Ch XXXVI
Rules of the High Court 1980 O 38 r 2(3), O 54
Rules of the Supreme Court 1957

**Appeal from**: Criminal Application No 44–110–90 (High Court, Pulau Pinang)

*Karpal Singh* (*Karpal Singh & Co*) for the appellant.
*Dato' Hamid Embong* (Deputy Public Prosecutor) for the respondents.

*Cur Adv Vult*

**Wan Yahya SCJ** (delivering the judgment of the court): In this appeal, we are particularly concerned with the issue as to whether in a hearing of a habeas corpus application, corrective and additional evidence by means of supplementary affidavits exhibiting documents tendered by the respondents after the applicant's counsel had closed his case and commenced his submission, were properly admitted by the High Court; and if not so

admitted, whether the requirement of s 3(2)(c) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('the Act') had been complied with.

What had transpired before the trial court is not in dispute. The applicant (appellant before us) filed his notice of motion on 14 August 1990. The hearing was held on 26 December 1990. In his submission to the learned trial judge, Mr Karpal Singh for the applicant referred to two affidavits filed by the respondents on 8 October 1990 (16A at p 26 of the appeal records). In the affidavit deposed by Insp Zakaria on 28 September 1990, the deponent stated that the applicant was arrested on 16 May 1990 at 11.50am and that he authorized further detention not exceeding 24 hours of the applicant at 3.30pm on 17 May 1990. Counsel contended in the court below that the continued detention of the applicant exceeding 24 hours, that is to say after 11.50am on 17 May 1990, without authorization, was in breach of s 3(2)(a) of the Act, and was therefore illegal, but before us, this ground of appeal was abandoned and rightly so, as it could not be disputed that the appellant was arrested at 11.50pm and not at 11.50am on 16 May 1990, and as such, his continued detention after 11.50am on 17 May 1990 was still within the 24-hour period.

The main ground of appeal is whether s 3(2) of the Act has been complied with on the basis of the available affidavit evidence filed in court as at the commencement of the hearing when oral submission by the applicant's counsel had already begun.

In the affidavit sworn by PPKP Osman bin Awal on 25 September 1990 (p 16 of the appeal records), the deponent merely stated at para 2 that he received the report on the arrest and detention of the applicant from the investigating officer on 29 May 1990 and 'seterusnya' (thereafter) he informed the Minister. In para 2 of his affidavit, PPKP Osman bin Awal stated as follows:

> Pada 29 Mei 1990, saya telah menerima laporan hal keadaan penangkapan dan penahanan Ng Hong Choon (selepas ini disebut 'pemohon') dari Timbalan Penguasa Polis Yahya bin Ismail dan seterusnya saya telah melaporkan hal keadaan itu kepada Menteri.

In respect of that affidavit, counsel adopted the same argument as in *Tan Yap Seng v Ketua Polis Negara & Ors* [1991] 2 CLJ 1400 in which Edgar Joseph Jr J held that in the absence of any evidence of the actual date on which the designated officer submitted his report to the Minister under s 3(2)(c) of the Act, the court is not at liberty to presume that he had done so 'forthwith'. On appeal, this decision was upheld by the Supreme Court.

No doubt, as a result of the argument raised by the applicant, the respondents' counsel sought for and was granted adjournment to enable him to file the additional affidavits. This was done despite the objection by the applicant's counsel. The affidavits were then filed on 25 September 1991, ie about ten months later and the case was eventually proceeded with on 19 December 1991. The motion was dismissed on 27 December 1991.

Lest we forget, we have to warn ourselves against deflecting into considering the merits of the respondents' affidavits. We are anxious at the moment only to determine whether such additional evidence in the form of additional affidavits can be accepted at such a late stage of the proceedings.

Dato' Hamid Embong, the respondents' counsel, drew our attention to s 425 of the Criminal Procedure Code (Cap 6) ('the CPC') and suggested that by analogy we could draw the inference that the additional evidence could be admitted. We are unable to accede to the contention for two reasons. First, s 425 is clearly intended to apply to a trial involving viva voce evidence in which witnesses can be examined, cross-examined and re-examined. Whereas a habeas corpus application which normally assumes the nature of a trial by affidavit, does not involve any witnesses who could be examined, crossed or re-examined. Furthermore, even if the provision is to be applied, the discretionary and imperative provision of that section must be exercised only in rare cases and with utmost circumspection especially so if the additional evidence sought to be introduced is likely to be prejudicial to the opposite party. See *PP v Abdul Hamid* [1969] 1 MLJ 53.

Before the repeal of O 54 of the Rules of the High Court 1980 ('the RHC') on 1 August 1993, vide PU(A) 192/93 and at the time when this application was heard in the High Court, the provisions of both the repealed order and s 365 of the CPC were available as procedural guidelines.

We are aware of various authorities on the subject, some of which have specified habeas corpus proceedings as civil whilst others as criminal and at least one had defined it as quasi-criminal. We do not consider it necessary for our present purpose to descend into the polemics of such classifications other than to comment on the circumstances and sequence of events following three of the following cases: In 1969, Abdul Hamid J in his judgment in *Munusamy v Subramaniam & Ors* [1969] 2 MLJ 108, dealt exhaustively with the origin and development of the High Court's power in issuing writs in the nature of habeas corpus commencing from the Courts Enactment No 14 of 1918 until the date of the judgment in 1969. At p 110 of the judgment, the learned judge said:

> The power to issue directions, orders, or writs of the nature of habeas corpus for the enforcement of any of the rights under Pt II is however subject to the proviso contained in sub-s (2) of s 25 of the Act, which provides that:
>
> > 'All such powers shall be exercised in accordance with any written law or Rules of Court relating to the same.'
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> The only written law relating to directions of the nature of habeas corpus can be found under Pt XXXVI of the FMS Criminal Procedure Code. Section 365 of the Criminal Procedure Code provides powers to the court of a judge to direct that any person who is alleged to be illegally or improperly detained in public or private custody within the limits of the Federation is to be set at liberty. Under Ch XXXVI provisions governing applications, affidavits, warrants, service of warrants and appeals were also made. Whatever may have been the position before the Courts of Judicature

> Act 1964 came into effect, it seems to me that by reason of s 25 of the Act the additional powers of the High Court as set out in the First Schedule must be exercised only in accordance with any written law relating to the same, and Ch XXXVI of the Criminal Procedure Code, being provision relating to directions in the nature of habeas corpus, would apply.

The rationale in this judgment was followed by Chang Min Tat J in *Osman bin Mat Isa & Ors v Superintendent of Prison, Alor Star & Anor* [1974] 1 MLJ 189 at p 190 wherein the learned judge stated:

> Applying the test in *Amand*'s case [1943] AC 142 then, how could I come to any other conclusion than that these matters are criminal causes? I therefore adopt with respect the decision of my brother Abdul Hamid J, in *Munusamy*'s case, that the matter was governed by Pt XXXVI of the Criminal Procedure Code (Cap 6) in the Malay States and the application should have been made under s 365 thereof.

Subsequently, in *Cheow Siong Chin v Menteri Dalam Negeri, Malaysia & Ors* [1985] 2 MLJ 95, Abdoolcader SCJ, whilst delivering the judgment in the court on a different issue of law, felt it necessary to suggest in a footnote that Parliament should perhaps consider repealing s 365 and such of its relative provisions in Ch XXXVI of the CPC as these provisions had been rendered redundant by the introduction of O 54 of the RHC.

Unfortunately, these comments have been interpreted by some legal circles as tending to show that habeas corpus proceedings are no longer criminal in nature. We do not think that the remarks in *Cheow Siong Chin* were intended to mean any more than what the learned SCJ had said, bearing in mind the legislative changes that had taken place since the two earlier cases were decided. *Munusamy*'s and *Osman*'s cases were decided in 1969 and 1974, respectively, at the time when the former Rules of the Supreme Court 1957, which contained no provision on habeas corpus, were in force. The only applicable provisions relating to such proceedings were then only to be found in the CPC. Pursuant to s 25 of the Courts of Judicature Act 1964, the learned trial judge in *Munusamy*'s case applied the only written law relating to the power to issue habeas corpus and the only written law at that point of time was s 365 of the CPC. Likewise in *Osman*'s case, the trial judge applied the same principle in refusing costs in the criminal application.

In between the two decided cases and *Cheow Siong Chin*'s case, there was a legislative change in the law relating to civil procedure. The Rules of the Supreme Court 1957 were repealed and the present RHC which came into force on 1 June 1980 contained specific provisions on habeas corpus in O 54. That probably precipitated the suggestions made in *Cheow Siong Chin*'s case. Be it so, the subsequent legislative change after the comments took an unexpected turn, and O 54 of the RHC was revoked. Even so, the footnote appears to us to be neither the ratio decidendi nor the obiter of that Supreme Court judgment. At most, it was only a helpful note intended to persuade the legislature into settling the somewhat ambiguous aspect of that law. Although the power for issuing a habeas corpus order at that time fell under s 365 of the CPC, the provisions of the code itself were silent on

the mode of procedure leaving such matters to be regulated by O 54 of the RHC. For instance, the right to use an affidavit in support of a motion of habeas corpus is reflected in ss 366, 367 and 424 of the CPC but the provisions in respect of a trial by affidavit appear in O 38 r 2(3) of the RHC. Even so, both the CPC and O 54 of the RHC did not provide the specific procedures to be followed during trial proper.

However, in our present appeal, we are not unduly troubled with the consequential effects of the legislative amendment to O 54. At the time when this case was heard in the High Court, that order was still in force and therefore, the provision of both O 54 and s 365 of the CPC were applicable in habeas corpus proceedings.

Perhaps it is more practical for the purpose of this case to treat habeas corpus proceedings as being neither strictly criminal nor civil but as proceedings which are civil in form and criminal in substance. In matters relating to the format and procedural rules as to the use of affidavits, O 54 and other related provisions may be resorted to but the proceedings must be conducted with the strictness of a criminal trial.

We consider that in a motion for a habeas corpus application which is normally heard on affidavit evidence, the general principle of practice requires that both parties file their affidavits within such time as the court may allow — which is usually two days before the date of hearing. It is only at the conclusion of the pleadings or in our present motion, at the close of the evidence that the court proceeds to hear the submissions and make a finding by due consideration of affidavit evidence to determine the truth of the point in issue raised by the parties.

In this case, the last affidavit was filed by the respondents on 24 December 1990, two days before the date fixed for hearing. Obviously the time for accepting affidavit evidence had been closed two days before the hearing date, ie on 24 December 1990, when the respondents' last affidavit was filed and as there was no indication by the appellant to file any reply to the respondents' affidavit, the court had proceeded to consider the merit of the motion on 26 December 1990 on the fundamental ingredient of all the affidavit evidence before it.

On the basis of the affidavit evidence, as recorded, and as it stood before the court at the hearing on 26 December 1990, it cannot be disputed that the defect in PPKP Osman's affidavit in failing to specify the actual date on which the report had been submitted to the Minister was fatal on the authority of *Tan Yap Seng v Ketua Polis Negara & Ors* [1991] 2 CLJ 1400 which was confirmed by the Supreme Court by the time the adjourned application of the applicant came up for hearing.

During the hearing it was also submitted to us, by counsel for the respondents, that the strict rule on additional evidence should likewise apply to the appellant's counsel's submission on the construction of the term 'forthwith'. Counsel states that Mr Karpal Singh should be similarly precluded from taking up this issue because such issue was not raised in any of the affidavits filed in support of the application. We would have agreed with the respondents' counsel's submission if what was sought to

A be further introduced was in the nature of affidavit evidence. In this particular instance, the appellant did not attempt to file any affidavit. His counsel, Mr Karpal Singh was only raising a point of law in his submission on judicial precedent which only became available as a binding authority after the Supreme Court upheld Edgar Joseph Jr J's decision in *Tan Yap Seng*'s case in between the adjourned hearings in the High Court.

B Even in normal rules on pleadings, a party may raise a point of law at the trial itself even though it had not been specifically pleaded. See *Independent Automatic Sales Ltd v Knowles & Foster* [1962] 3 All ER 27; [1962] 1 WLR 974.

C Under the circumstances, we consider that the applicant was sufficiently entitled to raise an issue of law as one of his grounds in respect of an allegation of non-compliance with the mandatory provisions of the Act.

It could not be denied that on the evidence available at the close of the affidavit evidence, the respondents were clearly in breach of the D provisions of the Act, in that they had failed to comply with the mandatory requirement of proviso (c) to s 3(2) of the Act. Indeed, if that was not so, the respondents' counsel would not have applied for an adjournment after the first point was taken up in the submission by counsel for the appellant and had proceeded to file, almost a year later, two additional affidavits to E rectify the errors.

Before us the respondents' counsel proffered two grounds in support of the decision to adjourn and admit additional and corrective affidavits. Firstly, it was argued, as previously submitted before the trial judge, that the correction was only of a trivial nature and secondly (not so raised before the lower court) that, by analogy, the power of s 425 of the CPC F was exercisable by the trial court.

On the second ground as put forth by the counsel, we have to revert to what had been said earlier that s 425 applies only to viva voce evidence. Even if such power is to be analogously applied to affidavit evidence, the normal rule as to the admission of additional evidence applies. We do not G propose to go into the mass of authorities dealing with fresh or further evidence. It would suffice if we were to reiterate the principle that the admission of such evidence is only confined to circumstances where the evidence sought to be adduced is raised ex impromptu or that such evidence was not available with reasonable diligence at the time when the H evidence of both parties had been closed. See *Yah bte Aji v Fatimah bte Haji Mohamed Ariffin & Ors* [1969] 2 MLJ 186; *Kesarmal & Anor v Valliappa Chettiar* [1954] MLJ 119; *Balfour v PP* [1949] MLJ Supp 8; *R v Day* [1940] 1 All ER 402; *Ladd v Marshall* [1954] 3 All ER 745; [1954] 1 WLR 1489.

The above cases demonstrate the strictness with which the courts I have applied the conditions for admitting fresh viva voce evidence. As a general principle, evidence available to the adducer of fresh or additional evidence ab initio, the relevance of which does not arise ex improviso which is intended to remedy defects in the adducer's own case is

inadmissible. It follows the principle against any attempt to adduce additional affidavit evidence especially after the aggrieved party has closed its case in cases affecting the liberty of the subject, must be applied with even greater vigilance by the trial court.

The reasons given for the admission of the additional affidavit in the trial court was that the evidence intended to be introduced was of a trivial corrective nature or in other words, a mere technicality. We do not consider the manoeuvre to alter a sworn statement by a further affidavit nor the transformation of words by a later corrective affidavit to elude the authority of an unforeseen judgment, after the time for filing evidence has been closed, to be in any way trivial in nature. In any event, in cases of this nature the appellant is nevertheless entitled to take advantage of any technical imperfection which has the effect of invalidating the restrictive order; or to use the precise words of Regby J in *Ex parte Johannes Choeldi & Ors* [1960] MLJ 184 at p 186:

> The distinction, no doubt, is a highly artificial one. But this is an application for a writ of habeas corpus, and the applicants, in matters which concern their personal liberty, are entitled to avail themselves of any technical defects which may invalidate the order which deprives them of that liberty.

Laws which deprive the subjects of their rights to personal liberty are subject to strict construction in the same way as penal laws — see *Nagin Singh v Jagannath* AIR 1944 Lah 422. It is a recognized principle of interpretation that laws which encroach on the rights of the subject should be construed in conjunction with laws which guarantee the subjects' fundamental rights to freedom — in our instant case, art 5 of the Federal Constitution — and whenever possible, to be so construed as to afford respect and recognition of such right — *Walsh v Sec of State for India* (1863) 10 HLC 367 in particular at p 386 per Lord Westbury LC. The power under the restrictive laws can only be exercised in accordance with the procedure laid down by the law — *State of UP v Lalai Singh Vadav* 1977 CLR (SC) 121; and in the event of any failure to conform to such procedure, the court may construe it in favour of the subjects' liberty. See *Tan Hoon Seng v Minister for Home Affairs, Malaysia & Anor* [1990] 1 MLJ 171. The need to conform strictly to procedure has been expressed by Lee Hun Hoe CJ (Borneo) in *Re Datuk James Wong Kim Min* [1976] 2 MLJ 245 in the following term [at p 251]:

> In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorizing detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith.

On the basis of the aforementioned authorities on strict interpretation and the need to conform strictly to procedures and having further regard to the fact that the additional evidence adduced after the close of the affidavit

A evidence was previously available to the respondents, we hold by a majority view (Gunn Chit Tuan CJ (Malaya) having retired on 20 May 1994 and the consent under s 42(1) of the Courts of Judicature Act 1964 having been obtained from both parties) that the High Court should not have adjourned the hearing and subsequently allowed the respondents to file additional affidavits for the sole purpose of remedying an obvious defect in their case.

B

Consequently, on the original affidavit evidence, on which counsel for the appellant had based his submission before the High Court, we hold that the provision of s 3(2)(c) of the Act has not been complied with and, therefore, the detention order issued by the Minister on 14 July 1990 in respect of Ng Hong Choon is invalid.

C

We, accordingly, allow this appeal and set aside the judge's order dated 27 December 1991. It is further ordered that the detainee, Ng Hong Choon be produced forthwith before this court to be set free.

D *Appeal allowed.*

Reported by Prof Ahmad Ibrahim

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